The appellant was interviewed by and led the customs party to the room of the other accused who was the chief tenant of the premises and who was acquitted and discharged at the close of the case for the prosecution. Subsequently, he also led the customs party to another room which was temporarily occupied by him and another male Chinese called Tan Ah Siong who was then sleeping and who was not called as witness. In the room they found opium smoking utensils. It was also established by the prosecution evidence that there were other tenants in occupation of the other rooms of the said premises.

On the above evidence the learned President found that there was "the inherent probability and a high degree of certainty if not absolute certainty that it was the appellant who was manufacturing i.e. cooking the opium and chandu at 4.30 a.m.". With respect the learned President should have acquitted and discharged the appellant at the close of the case for the prosecution which had not made out a *prima facie* case against him. There was no evidence that the appellant was in exclusive occupation of the kitchen where the two stoves were found and therefore he could not be held to be the occupier of it (see *Lim Say Hun* v. *Public Prosecutor*[1] and *Public Prosecutor* v. *Lai Ah Bee*[2]).

The prosecution also did not prove who was in custody or control of those stoves containing the dangerous drug in question and therefore it was not even able to prove who was in possession of the drug in question as the presumption under section 37(d) of the Dangerous Drugs Ordinance 1952, could not be invoked. Apart from the cheque book and a notebook found in the pocket of the appellant's trousers and from which various inferences could have been drawn, there was no evidence to prove that the accused was manufacturing the said drug at the relevant time.

Finally, the learned President also drew various adverse inferences against the appellant when he could have drawn inferences equally in favour of the appellant on the evidence adduced and recorded by him. (see *Phoon Liat Sum* v. *Public Prosecutor*[3]). The benefit of the doubt should have been given to the appellant and in all the circumstances of this case I therefore allowed the appeal and quashed the conviction.

*Appeal allowed.*

Solicitors: *R. Rajasingam & Co.; Annamalai & Co.*

## LIM LUAN v. SECK TEE HONG

**[A.C.J. (Wan Yahya J.) December 14, 1981]**
**[Malacca – Civil Appeal No. 12 of 1979]**

*Landlord & Tenant – Rent-controlled premises – Notice to quit – Suitable alternative accommodation must be offered to tenant – Control of Rent Act, 1966, s. 16(1)(m).*

*Landlord & Tenant – Rent-controlled premises – Notice to quit – No statutory period of notice – Monthly tenancy – One month's notice sufficient – Scope of Control of Rent Act, 1966, s. 16(1)(f).*

The appellant was in occupation of a controlled premises at the time of her husband's death. On January 10, 1971 the respondent bought the premises with the intention of starting a restaurant business. On July 10, 1976 he served a Notice to Quit and deliver vacant possession of the premises on August 31, 1976. On January 17, 1977 he proceeded to register a sole proprietorship business naming the unrecovered premises as his principal place of restaurant business. On January 19, 1977 the respondent commenced legal proceedings against the appellant.

The learned magistrate found in favour of the plaintiff because he had found the second ingredient of section 16 (1)(m) of the Control of Rent Act proved. The learned magistrate's judgment was challenged on the grounds relating to questions of proper notice, reasonableness and suitable accommodation.

**Held**, allowing the appeal: (1) in the absence of any statutory period of notice to be given to the tenant, subject to the rule of reasonableness the normal rules on notice in tenancy matters will apply. In this case, as the tenancy was one of monthly tenancy, a month's notice expiring at the end of the next following month would have been sufficient to terminate the tenancy;

(2) the evidence in this case does not support the conclusion on reasonableness or the availability of suitable alternative accommodation arrived at by the learned magistrate.

*Cases referred to:–*

(1) *Rajaratnam* v. *Gunn Lay Teik & Anor.* [1961] M.L.J. 199.
(2) *Thompson* v. *Rolls* [1926] 2 K.B. 426.
(3) *Hardial Singh & Ors.* v. *Malayan Theatres Ltd.* [1953] M.L.J. 180, 183.
(4) *Dixon* v. *Tommis & Anor.* [1952] 1 All E.R. 725.
(5) *Parmee* v. *Mitchell* [1950] 1 All E.R. 872.
(6) *Cumming* v. *Danson* (1942) 112 L.J.K.B. 145, 147.

CIVIL APPEAL.

*R. Krishnan* for the appellant.
*Thara Singh Sidhu* for the respondent.

*Cur. Adv. Vult.*

Wan Yahya J.: The Appellant herein had been in occupation of premises No. 106 Jalan Tokong, Melaka, which is a controlled premises at the time of her husband's death and she is therefore a tenant within the meaning of section 2 of the Control of Rent Act, 1966. Subsequently on January 10, 1971 the Respondent bought the premises with the intention of starting a restaurant business. However, for the period well over 6 years after the purchase, he did nothing towards realising this intention. Then on 10.7.76 he caused to be served by his solicitors on the Appellant, a Notice to Quit and deliver vacant possession of the premises on 31.8.76. On 17.1.77 he proceeded to register a sole proprietor-ship business with the Registrar of Businesses, naming the unrecovered premises as his principal place of vegetarian restaurant business. Two days after this, i.e. on 19.1.77, the Respondent, now appropriately armed with the certificate of registration, commenced legal proceedings against the Appellant. The learned Magistrate, after hearing the Respondent, (the Appellant having elected not to adduce oral evidence) decided in favour of the Respondent and made an order for the Appellant to deliver vacant possession within two months from the date of his order.

In his carefully written judgment the learned Magistrate indicated that he made an order for vacant possession in favour of the respondent because he had found the second ingredient under section 16(1)(m) of the Control of Rent Act proved. He accepted the authority of *Rajaratnam* v. *Gunn Lay Teik & Anor*[1] cited by the Plaintiff's Counsel and found further support for such authority from *Thompson* v. *Rolls*[2] The learned Magistrate's judgment, however, was challenged in this court on three distinct grounds, which could be briefly categorised as questions of proper notice, reasonableness and suitable accommodation.

It was submitted that a month's notice expiring at the end of the next following month was insufficient to terminate a tenancy of a rent-controlled premises and that a year's notice, as prescribed in section 16(1)(f) was the appropriate period. I am unable to share this view. Para. (f) of section 16(1) embodies a wide and general power to the court to allow recovery of possession by a landlord of controlled premises under certain circumstances but nowhere can we find any specific mention made of any statutory period of notice to be given to the tenant. In the absence of such a requirement I would hold that, subject to the rule of reasonableness, the normal rules on notices in tenancy matters will apply. In this case, as the tenancy was one of monthly tenancy, a month's notice expiring at the end of the next following month would have been sufficient to terminate the tenancy.

The next two grounds of appeal can be dealt with together. Now the requirements to be considered by a court before exercising its discretion in any application under section 16(1)(m) has been laid down by Lord Porter in the Privy Council case of *Hardial Singh & Ors.* v. *Malayan Theatres Ltd.*[3] as follows:

> (1) The order for possession must be considered reasonable by the court; and
>
> (2) It must be established that there is suitable alternative accommodation.

In an appeal in another case of *Rajaratnam* v. *Gunn Lay Teik & Anor.* (*supra*) Good J., delivering the judgment of the Federal Court, placed a duty upon the court hearing such an application for two questions to be answered:

> (a) Does the court consider it reasonable that an order for the recovery of possession of the premises should be made in favour of the landlord; and
>
> (b) Is the court satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order takes effect?

Although the law in *Rajaratnam's* case and ours are exactly the same, the facts are greatly distinguishable. In *Rajaratnam's* case the tenant owned a building nearby on the same street, which was not only suitable as her alternative accommodation but was spacious enough for part of it to be leased out to others. At page 201 Ong J. in the High Court proceedings summed up the situation between the parties thus:

> "Speaking bluntly, it is only too clear that the defendant, or her husband, claims the protection of the Ordinance on no conceivable grounds of hardship, but only in order that they may continue to enrich themselves by putting out their property for rent at uncontrolled rates while retaining rent-controlled premises for themselves. I do not think their conduct and attitude at all reasonable and I, for one, will not lend the assistance of the court to any tenant abusing the provisions of the Control of Rent Ordinance for profiteering at the landlord's expense."

Similarly in *Dixon* v. *Tommis & Anor.*[4] the part of the judgment quoted was about the caution to be exercised by the courts in giving protection to tenants having two places of accommodation, or, as described in the judgment, "two-house men".

Both these cases, to my mind, are not applicable here because the favourable decisions given to the landlord were based on the consideration of the ownership and/or availability of alternative accommodation to the tenant.

The next two authorities relied upon by the learned Magistrate are passages taken from *Thomson* v. *Rolls* (*supra*), which read as follows:

"The next thing the Plaintiff has to prove is that there is alternative accommodation available for the defendant. *Ex hypothesi* the plaintiff is getting possession of the whole house, but *ex instanti* it appears that the defendant can have the five rooms that she now occupies at a rent which the learned county court judge has found to be reasonable. Why is not that alternative accommodation? I think it is."

and *Parmee* v. *Mitchell*[5] which reads as follows:

"Looking at the matter from that point of view, the alternative accommodation offered is not simply the identical premises of which the defendant is in law in possession, but the part of those premises of which he is in actual physical occupation and which represents the only part of such premises that is necessary to provide the accommodation he wants.

The lower part of the premises can, therefore, in my view, properly be regarded as "alternative accommodation" although it is part of the entire house of which the defendant is at present in possession."

Both authorities have been cited, no doubt, with the intention of showing that any part of an original accommodation is good alternative accommodation. Having read both the judgments I am unable to accept that they convey such ruling. *Thomson* v. *Rolls* (*supra*), for instance, concerns the recovery of possession of two of the rooms in the house which the tenant had sublet to others. The tenant was not in occupation of these two rooms and, although the County Court gave her possession of the whole premises, it made an order that the landlord offer her the tenancy of all the five rooms which she had previously occupied. The fact here is that the alternative accommodation offered to the tenant was exactly the very same accommodation previously occupied by her undiminished in any manner. *Parmee* v. *Mitchell* (*supra*) was also decided on similar facts clearly elucidated from the head-note thus:

Held: (i) there would be an order for possession subject to a proviso that the defendant should be *entitled to remain in occupation of the part which he, in fact, occupied.*

(emphasis is mine)

In our present case the learned Magistrate considered that the offer of only two rooms on the 1st floor temporarily (as against the whole of the ground and first floors) to be reasonably made and that they do constitute suitable alternative accommodation. He found that the restriction of her accommodation to merely two rooms will not inconvenience her or cause her any disadvantage but he gave no indication as to how or from what evidence he arrived at this conclusion. The record of evidence taken before the lower court discloses no such evidence.

The relief given to the landlord in section 16(1)(m) is based on the court's discretion. It is a power entrusted to the court purely to remedy any possible imbalance of justice to landlords which might arise out of the strictness or technicality of the Control of Rent Act, but it should never be allowed to defeat the protection which Parliament had generally prescribed for the tenant. Judicial discretion must be exercised judiciously and not capriciously. As a judge, who is asked to invoke his discretionary powers under section 16(1)(m), the learned Magistrate is under a duty to take into account all relevant circumstances existing at the date of hearing before deciding on the question of reasonableness. See *Cumming* v. *Danson*[6]. If the facts before him are insufficient or not properly disclosed, there is nothing to prevent him from a *locus in quo* and to consider from whatever evidence available including his own visual observation for the purpose of arriving at a fair conclusion. A descriptive verbal account of the situation or condition of any premises can seldom portray the true state of affairs existing therein. A Magistrate, who is faced with any doubt or inadequate information regarding any circumstance affecting a tenancy, can promote better justice by personally viewing the premises. In our present case I am unable to see how the restriction on the tenant to the occupation of merely two rooms could be said to be uninconvenient. Out of these two rooms one may be her bedroom and the other the living room, but what of her cooking and toilet facilities? Even if one of the rooms is intended for these, one cannot think in terms of a toilet and a kitchen being accommodated in the same place. Under such circumstances, I do not think the confinement of the tenant from occupation of the whole house to two rooms can be accepted as a reasonable act.

Even if the landlord's act can be construed as reasonable, he has yet to establish that he could provide her with suitable alternative accommodation. Section 16(1)(m) of the Control of Rent Act, 1966 states no order for the recovery of con-

trolled premises or any part thereof shall be made by the court except

"in any case, whether falling within any of the preceding paragraphs or not, where the court considers it reasonable that such an order or judgment be made or given and is satisfied that suitable alternative accommodation *is available* for the tenant or *will be available* for him when the order or judgment takes effect."

(emphasis is mine)

It would appear from the construction of the above paragraph that it is an essential duty of the landlord to show to the court that either such suitable accommodation is available for the tenant at the time when the proceedings are heard or at a subsequent date on which the court orders the tenant to vacate the controlled premises. Was such suitable accommodation available at the time when the case came up for hearing before the court below or three months afterwards when the order for vacant possession was to have taken effect? I do not think any such accommodation was available at all.

The passages taken from the landlord's evidence read as follows:

"... I have no objection to the Defendant occupying 2 rooms on the 1st floor *until* I get alternative accommodation for her."

"... I can get room for her temporarily – whether she accepts or not I would not know."

My impression of the above evidence is that the landlord could only at the time of the hearing before the Magistrate offer the tenant two rooms out of the whole house until he could get the alternative accommodation for her and that whatever accommodation he could offer her was only of a temporary nature.

If I may echo the words of Lord Porter in the Privy Council case of *Hardial Singh* (*supra*) at pages 183, 184:

"It is true that all the circumstances must be taken into account but after they have all been duly weighed it is still incumbent on the court as an independent and essential requisite that suitable alternative accommodation exists or will exist when any order or judgment for possession takes effect.

Unless this requirement is complied with no court is entitled to make an order, however much it is persuaded that it is reasonable to do so, and though as in this case the learned Judge who tried the case finds it reasonable there was in their Lordships' view no evidence of suitable alternative accommodation."

The evidence in this case does not support the conclusion on reasonableness or the availability of suitable alternative accommodation arrived at by the learned Magistrate. I therefore allowed this appeal and set aside the order made by the court below. The respondent should pay the costs of the proceedings.

*Appeal allowed.*

Solicitors: *Tay Leong Siak & Co.; Goh Soot Hwang & Co.*

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## UNITED NATIONAL FINANCE BHD. v. TAN YAM SING & ORS.

[A.C.J. (Mustapha Hussain J.C.) December 1, 1981 & January 28, 1982]
[Penang – Civil No. 11 of 1979]

*Stamp Ordinance – Promissory note unconditional and unstamped – Effect of – Stamp Ordinance 1949, ss. 2 & 41.*

*Contract – Memorandum of Agreement – Whether promissory note.*

The appellant lent $5,000 to the respondent under a Memorandum of Agreement, which was signed by the borrowers/respondents and the surety, and also the appellant. The Memorandum was signed and executed on June 6, 1975 but it was stamped one day after execution. The respondents defaulted in payment of the loan and the appellant filed a claim for the balance of $1,666.72 against the respondents and the surety.

At the trial learned counsel for the respondents successfully objected to the admissibility of the Memorandum of Agreement for a loan on the ground that it was a promissory note within the meaning of section 2 of the Stamp Ordinance 1949 and that it was not stamped in accordance with section 41 of the said Ordinance.

The sole issue before the appeal court was whether the Memorandum of Agreement was a promissory note.

**Held**, dismissing the appeal: (1) to be a promissory note there must be an unconditional promise to pay a certain sum and it must be in one entire instrument. It must be a promise to pay absolute and must not depend on a contingency or a stipulation.

(2) the Memorandum in this case contained a promise to pay and is not coupled with any stipulation or any contingency. The fact that there was a clause where the surety would be liable if the borrower defaulted and that the lender could recall the balance of the loan at any time, were purely arrangements of the "promise to pay" and did not in any way affect the character of the promissory note.

*Cases referred to:–*

(1) *Alagappa Chettiar* v. *Freedam Shah* [1977] 2 M.L.J. 147.